

EXHIBIT 1

In Re	2-20-20230 (PRW) Chapter 11
Rochester Drug Co-Operative, Inc., Debtor.	November 2, 2022 Rochester, New York

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE PAUL R. WARREN
UNITED STATES BANKRUPTCY JUDGE

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1 or disapprove what's in front of me. But I can't rewrite the
2 terms of it, can I?

3 **MR. SCHARF:** Judge, unfortunately, or fortunately, in
4 some cases Courts cannot, I agree with that statement, you
5 cannot rewrite the settlement agreement. It's something that
6 was heavily negotiated. And when it's my turn, I'll have a
7 couple of comments and questions.

8 **THE COURT:** Sure. Go ahead.

9 **MR. SCHARF:** Thank you, your Honor.

10 One, I think I heard from a number of the counsel for
11 directors. I just want to confirm this: That there would be
12 no objection to this settlement agreement if it did not
13 affect the rights of the directors; is that correct?

14 (No response.)

15 **MS. DHINOJWALA:** And if it did not exhaust the policy
16 limits. What you're trying to do is exhaust the \$6 million
17 for us.

18 **MR. SCHARF:** Okay. So if we, if we, if we -- if this
19 was -- if this does, if this settlement -- approved
20 settlement between the Trustee, and as is for \$3.4 million,
21 and Hiscox without affecting the additional, the directors'
22 rights or exhausting the policy, it would be acceptable,
23 correct?

24 (No response.)

25 **THE COURT:** Well, let me try to answer that question.

1 That's the question I opened today's discussion with was
2 why the directors -- I think as I read the directors'
3 requested edits that came under cover of July 22, that's how
4 I read their version. And my question to open today's
5 discussion was why is that version not acceptable and what I
6 heard was Hiscox won't approve it.

7 But that's how I read their proposed, what I viewed, and
8 I don't mean this in an insulting fashion at all, their
9 simplistic edits seemed simplistic in a careful sense to make
10 it clear that the directors are not affected, their
11 contractual rights to the extent they have any, or property
12 rights to the extent they have any, are not part and parcel
13 of the settlement. That's how I read their proposal.

14 What I heard this morning was that's a nonstarter.

15 **MR. SCHARF:** So, your Honor, the Trustee again, of
16 course, is kind of caught between a rock and a hard place in
17 some respects because I -- from what I'm hearing, I think --
18 and for a number of reasons -- I think it would be helpful to
19 have the directors confirm that statement on the record and
20 address that. Just because -- look, we have an insurance
21 contract. We have a insurance coverage action that's been
22 pending for years. The insurance settlement agreement as to
23 the estate, I think, is eminently reasonable and based on the
24 record, I don't think there's any dispute on this, just again
25 as to the dispute between Hiscox and the Trustee provides for

1 a fair resolution of complicated and, you know, coverage
2 litigation which, of course, (indiscernible).

3 But I think that it would be very helpful for Hiscox to
4 hear, loud and clear, from the directors on the record that
5 there will be no objection to this settlement, if the, if the
6 settlement of \$3.4 million does not affect the directors'
7 rights under the policy or exhaust coverage as to them.

8 **MR. BRUECKNER:** I think it would be more important for
9 the directors to hear from Hiscox that that settlement would
10 be available -- that it would be acceptable to Hiscox.

11 **THE COURT:** Well, let me ask this question to both
12 Mr. Brueckner and Mr. Scharf.

13 What was handed to the Court today was the directors'
14 requested edits that I believe were dated July 22, 2022,
15 would that be acceptable to the directors, if Mr. Scharf
16 said, okay, we'll go with your version, Mr. Brueckner, does
17 that solve your problem?

18 **MR. BRUECKNER:** Speaking on behalf of our clients, your
19 Honor, Pagnotta and Klein, it would be acceptable, yes.

20 **MR. BOONE:** Your Honor, I think that this discussion is
21 not particularly constructive.

22 There was a statement by Mr. Brueckner that the
23 settlement itself seemed orchestrated and in bad faith
24 because the timing of the action against the directors and
25 officers. But the record clearly shows this settlement was

1 the Trustee is ignoring all of history here and the
2 precarious position that we believe the Trustee and the
3 estate are in vis-a-vis coverage for this matter.

4 **THE COURT:** Well, that's certainly all well and good.
5 The problem for the Court is the Trust can only settle what
6 it has property rights in.

7 And not to be critical: The two cases that the
8 directors relied on, I personally didn't find particularly
9 helpful or interesting. And was a little surprised that the
10 directors didn't cite *Adelphia Communications*, 364-BR-518
11 Bankruptcy Court Southern District 2007 which dealt with a
12 similar issue where Adelphia, the Trustee there wanted to
13 compromise a D&O policy. And in footnote four, the Southern
14 District made it very clear that, unlike this case, the
15 *Aldelphia* case did not have a priority of payments provision.

16 Here we do. And little bit different there. That was a
17 363(f) motion. But at the end of the day, the Court found
18 that it could not approve the proposed settlement because it
19 was compromising rights of directors and objectors who may
20 have contract or property right, property rights to the pot
21 available from the insurers.

22 The other case that I found particularly instructive
23 that wasn't cited is *In re SoyNut Butter Company*, 2018
24 Bankruptcy Lexis 2300, Bankruptcy Court, Northern District of
25 Illinois, 2018. That, again, involved a little bit of 363(f)

1 but had a lot of comments that ring true here where the Trust
2 there, the Trustee, the debtor, was trying to compromise a
3 policy, exhaust a policy in which other parties had
4 contractual rights.

5 Whether or not those rights might win out in litigation
6 wasn't the issue before the Court. The issue was whether the
7 Trustee could compromise or exhaust the policy limit and at
8 Page *9 of the Lexis version, the Court said SoyNut's
9 insurance policies and its resulting contractual right to the
10 proceeds under those policies undoubtedly constitute property
11 of the estate.

12 However, that does not mean all of the policy property
13 proceeds belongs solely to the estate. In fact, the answer
14 to that question turns on the nature of the policy.

15 The Court went on to cite the *Caesars* case at
16 533-BR-714, Page 734 and said in *Caesars* the bankruptcy court
17 considered broadly-written policy that provided coverage to
18 the Chapter 11 debtor, non-debtor parent company and other
19 subsidiaries along with all of their respective directors and
20 officers. Because the debtor and the objecting non-debtor
21 had the same organizational coverage, the Court found the
22 additional insureds held independent rights to policy
23 proceeds, rights that are their property alone.

24 The Court went on to say, citing another case, *Petters*,
25 at 419-BR-369 at Page 375, again, quoting, recognizing that

1 any additional insured has a contractually distinct status
2 that runs directly between itself and the insurer so that
3 right to receive payment on a covered claim is property of
4 that insured itself. As such, even though the debtor's
5 rights and the proceeds constituted estate property, they
6 could not trump an additional insured's quote, "equal and
7 independent right to the policy proceeds", closed quote,
8 which are not estate property.

9 And then the Court said the same principle holds true
10 here. SoyNut in selling its contractual right to the policy
11 back to the carrier, that is all estate owns. The objecting
12 parties are entitled to exercise their own right to seek
13 indemnification and defense under the sentinel policy until
14 the policy limits are exhausted.

15 And that Court reached the same conclusion as did Judge
16 Gerber in the *Adelphia* case and said because the directors
17 and officers had independent contractual rights, whether or
18 not those rights might ultimately be found to be
19 enforceable -- under state law's another matter -- but
20 because they had independent contractual rights, those rights
21 could not be adversely affected by a settlement.

22 And what I see in Paragraph 7 of the redline policy
23 before me does exactly that. And based on the authority of
24 both the *SoyNut* case and the *Adelphia Communications* case,
25 this Court finds that the proposed settlement between the

1 Trustee and Hiscox is affecting, or may affect, the rights of
2 the directors in policy proceeds or contractual rights beyond
3 the estate's interest.

4 And for those reasons, the Court is not prepared today
5 to approve the settlement agreement.

6 Again, based on *SoyNut Butter* and *Adelphia*
7 *Communications*, I think this settlement agreement goes too
8 far.

9 Because the settlement is written in a manner in which
10 one's imagination is left open in what's not said, the fact
11 that it's exhausting the policy limits in which the directors
12 have a contractual right under coverage A and under the
13 priority of payments are the first priority insured party,
14 the way Paragraph 7 is set up, it appears to improperly
15 impair those directors' contractual rights.

16 Therefore, this Court -- while this under the Iridium
17 factors, the settlement certainly is in best interest of
18 estate.

19 However, that's not the end of the discussion. The
20 Court cannot find based on the presentation made by the
21 Trustee that the settlement is fair and reasonable because it
22 appears to either directly or indirectly cut off the contract
23 rights of the directors who have independent contractual and
24 property rights under the D&O policy.

25 So, rather than write a decision that won't come out for

1 a month, I'm entering this oral decision with all its
2 blemishes and bumps and bruises to put an end to this
3 discussion.

4 I'm going to deny the motion at ECF 1585 without
5 prejudice.

6 If the directors, the carrier and the Trustee, are able
7 to come up with a version of a settlement agreement that
8 leaves the directors' rights intact, so be it.

9 If that's a deal killer, you still have a case pending
10 in front of Judge Welford. I know she's keeping an eye on
11 what I'm doing up here. And if that means that action is
12 going to go forward, so it be. If that means that the
13 directors may need to intervene in that action to preserve
14 and protect their property rights, that's a litigation
15 decision that they'll need to make.

16 But the burden of proof under 9019 on the Trustee today
17 is to not only prove that the settlement is in the best
18 interest of the estate but also to prove that it's fair and
19 reasonable. And based on the holdings in the *Adelphia*
20 *Communications* case and the *SoyNut Butter* case, this Court's
21 determination is that this proposed settlement is not fair
22 and reasonable to the covered directors given the priority of
23 payment provisions that are in the contract.

24 And had they been in the *Adelphia* contract, I suspect
25 that that decision would have been many pages fewer, would

1 have reached the same result but for the same reason that
2 this Court is following the *SoyNut Butter* decision.

3 So, this oral decision, the transcript of which is
4 incorporated by reference, and all of your submissions are
5 the record in this case, that's the Court's ruling. We are
6 going to be in recess and off the record.

7 And again, the motion is denied. It is denied without
8 prejudice, however.

9 I want to thank you all for your presentations. I wish
10 you good luck in the future. And we are off the record.

11 (WHEREUPON, proceedings adjourned.)
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